Dravo Lime Company, Maysville Division *and* United Mine Workers of America, District 17, AFL–CIO. Case 9–CA–33609

September 30, 1998

DECISION AND ORDER

BY MEMBERS FOX, HURTGEN, AND BRAME

On September 24, 1997, Administrative Law Judge Richard H. Beddow Jr. issued the attached decision. The Respondent filed exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings,[1] and conclusions[2] and to adopt the recommended Order.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Dravo Lime Company, Maysville Division, Maysville, Kentucky, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

Engrid Emerson Vaughan, Esq., for the General Counsel.
Don T. Carmody, Esq., of Kirhonkson, New York, for the Respondent.

DECISION

STATEMENT OF THE CASE

RICHARD H. BEDDOW JR., Administrative Law Judge. This matter was heard in Cincinnati, Ohio, on March 12 and May 12–14, 1997. Subsequent to an extension in the filing date briefs were filed by the General Counsel and the Respondent. The proceeding is based upon a charge filed February 15, 1996,[1] by United Mine Workers of America, District 17, AFL–CIO. The Regional Director's complaint dated May 2, as amended alleges that Respondent violated Section 8(a)(1) and (3) of the National Labor Relations Act (the Act) by discharging employee Jack Gilbert because of his union or other protected concerted activities.

Upon a review of the entire record[2] in this case and from my observation of the witnesses and their demeanor, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent is engaged in the mining, distribution and sale of lime. It annually ships goods valued in excess of $50,000 from its Maysville location to points outside Kentucky. It admits that at all times material is has been an employer engaged in operations affecting commerce within the meaning of Section 2(2), (6), and (7) of the Act. It also admits that the Union is a labor organization within the meaning of Section 2(5) of the Act.

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[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

The Respondent has requested oral argument. The request is denied, as the record, exceptions, and brief adequately present the issues and the positions of the parties.

[2] The judge concluded, and we agree, that the Respondent violated Sec. 8(a)(3) and (1) of the Act by discharging employee Jack Gilbert. In this regard, we note that the judge did not specifically find that the Respondent harbored animus against Gilbert for his union activities. However, we find that the record amply demonstrates such animus, because the Respondent has effectively admitted an antiunion motive. Its termination letter to Gilbert referred to an earlier incident in which he allegedly "threatened" a supervisor who had given him a warning. In that episode, according to the credited testimony, Gilbert told Plant Production Superintendent Michael Hartley that "you've got to do what you've got to do and I've got to do what I've got to do, which is call the Union." As the judge found, an employee who has just been disciplined has the protected right to take his problem to a union, and cannot be further disciplined for announcing his intention to do so, absent other abusive conduct not present here. By citing Gilbert's "threat" to go to the Union as part of the reason for firing him, the Respondent has admitted that union animus contributed to his discharge. See *Precision Industries*, 320 NLRB 661, 661 (1996), enfd. 118 F.3d 585 (8th Cir. 1997), cert. denied 118 S.Ct. 1299 (1998). Accordingly, under all the circumstances of this case, and in light of the pretextual nature of the proffered reasons for Gilbert's discharge, we find that discharge was unlawful.

In finding antiunion animus, Member Brame does not rely on the Respondent's statements of opposition to the Union's organizing, described in sec. III, par. 1 of the judge's decision. He finds these statements are protected by Sec. 8(c) of the Act. See *Holo-Krome Co. v. NLRB*, 907 F.2d 1343, 1345–1347 (2d Cir. 1990), and cases cited therein, and *Medeco Security Locks, Inc. v. NLRB*, 142 F.3d 733, 744 (4th Cir. 1998).

The Respondent excepts to the judge's finding that Gilbert is entitled to reinstatement. It contends that the judge erred by precluding it from fully litigating subsequently acquired evidence of misconduct allegedly sufficient to disqualify Gilbert from reinstatement. The Respondent argued (i.e., its ninth proffered affirmative defense) that Gilbert "physically and verbally threatened an incumbent employee of the Respondent and verbally threatened such employee's spouse," and that this conduct would have warranted Gilbert's termination on November 1, 1996. When the Respondent raised this issue, the General Counsel suggested it should be addressed at the compliance stage of this proceeding. The judge granted the General Counsel's motion to strike this defense, along with certain other affirmative defenses offered by the Respondent. The judge allowed the Respondent to make a written offer of proof as to the stricken defenses. The Respondent did so. In fn. 4 of his decision, however, the judge appears to reject the offer of proof and to decide the reinstatement issue as if the matter had been fully litigated at the hearing. Under these circumstances, we do not adopt fn. 4 of the judge's decision, and instead we shall permit the Respondent to pursue this matter in compliance proceedings.

Member Hurtgen emphasizes that his decision here is limited to the particular and peculiar facts of this case. On these facts, and given the blatantly pretextual reasons for Gilbert's discharge asserted by the Respondent, he agrees that the discharge violated the Act.

[1] All following dates will be in 1996 unless otherwise indicated.

[2] I affirm all rulings on motions and objections made prior to conclusion of the hearing and find no need to discuss further matters pertaining to the Respondent's so called affirmative defenses except as it relates to the reinstatement remedy and as discussed below.

II. THE ALLEGED UNFAIR LABOR PRACTICES

The Respondent has operated a lime mining and processing facility at Maysville for many years. Jack Gilbert was a long-term employee having been employed there from August 1976 until his discharge in February 1996. Gilbert had been the primary employee behind some prior union campaigns as well as the most recent 1995 campaign on behalf of the United Mine Workers. His longstanding union advocacy was prominent and well known among the management and hourly personnel at the Maysville facilities. Gilbert initiated the 1995 campaign by handing out flyers and acting as liaison between the Union and the employees by setting up and notifying employees of union meetings. During late fall and early winter of 1995, the Union generated some employee interest, and scheduled a meeting for February 1996, after the holidays.

On the morning of February 9, before any union meeting was held, Gilbert's carpool was delayed when the designated driver's vehicle would not start. After some failed efforts to start the vehicle, it was decided that Gilbert would drive his truck to work, although Gilbert had promised the use of his truck that day to the son of his girl friend that the son would have to be notified to make other arrangements. There were no easily assessable phone on the route to work but otherwise Gilbert was aware of the company phone procedures and on arrival at work he looked for a supervisor to get an okay to use the phone. He testified that he checking both the offices of Supervisor Danny Pruitt and Plant Maintenance Supervisor Kenny Flack but did not see either of them. He passed by the phones in the empty offices and went to the nearby warehouse where he saw Jerry Barbour the employee in charge of the warehouse at his desk looking over some paper work. Gilbert testified that it was 20 minutes before his 7 a.m. starting time and that he asked if he could use the phone, and Barbour looked up, nodded "yes" and went back to his paperwork. He reached for the phone on Barbour's desk and verbally confirm with Barbour that he had to push "9" for an outside line and then made a 2- to 3-minute phone call. While on the phone he saw Electrician Supervisor Jerry Armstrong walk by an adjoining area.

At between 9:30 and 10 a.m. company manager and vice president, Jim McCann, came to Gilbert's work area and asked if he had used the phone prior to going to work. When he answered yes he was instructed to come back to Kenny Flack's office with McCann. They then went to the conference room when McCann asked Gilbert if he knew the Company's policy about using the phone. Gilbert said he did and that he had asked Barbour for permission. McCann said lets go ask "Jerry" and they went to the warehouse. Barbour was questioned and responded that he did not recall. They returned to the conference room and McCann told Gilbert he was terminated pending hearing.

Gilbert thereafter requested a hearing before the company peer review committee and on February 15 was given a letter (confirming a phone call the previous day) terminating him immediately "for using a Company telephone for personal use in violation of Company policy." The letter also added the following:

> Moreover, during my initial investigation into this matter, during which you were informed of you suspension, at the conclusion of the meeting with Kenny Flack, you made threatening and coercive remarks. This is the second time you have made such remarks to a supervisor in recent months.
>
> As you also know, you have been previously disciplined for repeated occurrences of similar behavior, and have nevertheless failed to heed a Final Written Warning, issued on 9/12/95.
>
> Your conduct warrants your termination.

III. DISCUSSION

In proceedings involving changes in conditions of employment and disciplinary action against employees, applicable law requires that the General Counsel meet an initial burden of presenting sufficient evidence to support an inference that the employee's union or other protected concerted activities were a motivating factor in the employer's decision to change their conditions of employment or to discipline them. Here, the record shows Gilbert was an open proponent of a new organizational drive and that the Respondent was aware of the employee's past union activity and knew that he had repeatedly supported prior attempt to organize the employees. It also is shown that shortly after Gilbert's November 30 union organizational meeting (which the Respondent admitted knew about prior to the meeting), Vice President McCann told Gilbert that he did not think "we" needed a union, that it would tie "their" hands, "they" could not be flexible with a union, and he did not understand why "we" wanted a union.

Under these circumstances and in view of the timing of the Respondent's actions in terminating Gilbert before the second union meeting could occur, I find that the General Counsel has met his initial burden by presenting a showing sufficient to support an inference that the employee's union activities were a motivating factor in Respondent's subsequent decision to terminate him. Accordingly, the testimony will be discussed and the record evaluated in keeping with the criteria set forth in *Wright Line,* 251 NLRB 1083 (1980), see *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983), to consider Respondent's defense and whether the General Counsel has carried his overall burden.

As pointed out by the Court, in *Transportation Management Corp.,* supra:

> [A]n employer cannot simply present a legitimate reason for its action but must persuade by a preponderance of the evidence that the same action would have taken place even in the absence of the protected concerted activity.

Here, the record shows that Gilbert was a long-term employee, however, he was a prime initiator of efforts to bring in a union and his latest efforts in union organizing was to promote a meeting of interested employee to be held in February. Before the meeting could be held he was terminated for allegedly using a company phone in violation of company policy, an action that resulted in an effective end to any union organizational activities.

The Respondent argues that Gilbert was fired because he was observed using the phone by Kenneth Flack, Respondent's plant maintenance superintendent, who, knowing that Gilbert had not yet begun work, immediately asking Gilbert's direct supervisor, Danny Pruitt whether he had granted Gilbert's permission. Upon being told that he had not, Flack told McCann (the Company's work manager at that time), of the apparent violation of the Company's telephone policy. McCann met with Flack later in the morning, and Flack explained that he had not given Gil-

bert permission to use the telephone and that he had asked Pruitt whether he had given Gilbert permission and was told "no." Superintendent Flack did not exercise his own authority to question Gilbert when he saw Gilbert on the phone but deferred any timely confirmation and brought this seemingly minor incident to the immediate attention of McCann, the most senior management representative on site. This action would seem to be unusual were it not for the fact that Gilbert was not just any employee but was known to be one engaged in a new union organizing effort and McCann had questioned why Gilbert or the employees would want a union that would tie management's hands.

After getting Gilbert to accompany him back to the main office, McCann asked Flack to repeat for Gilbert what he had observed earlier that morning and accused Gilbert of using of a Company telephone without permission. When Gilbert then said that he had been given permission to use the telephone by Jerry Barbour, they went directly to the warehouse, and McCann asked Barbour whether he had given Gilbert permission to use the telephone. Barbour stated that Gilbert had asked him how to get an "outside line," but that he could not recall Gilbert having asked for permission to use the telephone. McCann then reminded Gilbert that he had been placed on a "Final Written Warning" several months previously, told him that he had violated company policy by his use of the telephone without permission, and immediately told him that he was being suspended, pending termination. Gilbert responded immediately by stating to McCann, in a "firm" tone of voice, words to the effect "You've got problems." When McCann reacted by uttering words to the effect "You think so?" Gilbert responded immediately with words to the effect "No, you've really got problems!" McCann testified that he perceived Gilbert's remarks to the effect that he had "problems" as threatening.

As pointed out by the General Counsel the Respondent's employee handbook states that misconduct resulting in discipline is divided into three groups and among the group A rules (violations of which are less serious in nature) is "unauthorized use of the telephone during working hours." The record reveals that in about January 1995, in response to an egregious abuse of phone use, involving astronomical long-distance bills racked up by a particular employee, Respondent posted an additional "Notice" referring to use of the telephone as follows:

> Dravo Lime receives an itemized long-distance telephone bill similar to the bill we all receive for our home phone.
>
> The use of company telephones should be for company use not personal use.

Here, the records shows that both before and after this notice the company supervisors had a practice of freely granting permission for employees to use the phone for any emergency or explained necessary reason. The record also shows that employees felt free to use the phone for their personal use especially in circumstances where either a supervisor was not readily available for permission or it was a matter of personal urgency.[3]

Here, I am not persuaded that the top plant official would be immediately and directly involved in the accusation and investigation of a possible minor policy violation that occurred before work started (and without any loss of worktime) were it not for Gilbert's notorious union activities and the budding new organizational attempt.

While it appears that there was some past phone abuse at the Company there is no showing at all that that abuse was related or like Gilbert's use of the phone. Moreover, the notice that the Respondent relies upon makes no mention of permission and I find that the accepted practice at the facility was described by the General Counsel's witnesses, see footnote 3. Here, the Respondent's top manager accused Gilbert of a policy violation and became personally involved in the preliminary investigation. This investigation did not disprove Gilbert's defense that he had obtained permission to use the warehouse phone. In fact McCann learned from Barbour that Gilbert had asked him how to get an outside line, a statement that would tend to corroborate Gilbert's claim. While Barbour then said he didn't "recall" whether Gilbert had actually asked "permission," McCann chose not to credit Gilbert but immediately reached the opposite conclusion, told Gilbert he had acted without permission and fired him.

At best, Barbour's statement was not conclusive and, in the light of the regular company practices regarding phone use, McCann's decision to immediately terminate a 20-year employee under these circumstances appears to be specious and pretextual.

The additional charge in Gilbert's letter of termination that he made "threatening and coercive remarks" after he was told he was terminated pending hearing for merely saying, "[Y]ou've got problems" (in an apparent reference to Gilbert's thoughts of pursuing unfair labor changes), actually tend to further indicate the pretextual nature of the Respondent's claim.

The letter claimed that Gilbert had made such remarks to another supervisor in recent months and the Respondent called Plant Production Superintendent Michael Hartley who testified that after he gave Gilbert a written warning in late 1995, as Gilbert was leaving, Gilbert was not happy with it and said; "[I]n a rather stern voice. He wasn't screaming or yelling"—"[Y]ou've got to do what you've got to do and I've got to do what I've got to do." Hartley then reported those last remarks

[3] Nearly every employee witness who testified had used the phone for personal use without prior supervisory permission. Indeed, the testimony reveals an attitude that using the phone for personal use was such an accepted practice that employees hardly gave it a thought. Employee Larry Mason testified that employees "always use the phone" and that he has been on the phone when a supervisor saw him and received no disciplinary action. Employee Charles Williams testified that he knew of no restrictions on the phone and used it to call home to check on his wife on occasion and that his supervisor had seen him using it without prior permission, but he received no disciplinary action therefor. Employee Mike Yates, likewise testified that just about everybody used it and that he had, during a period of time, called home about two or three times a month. If a supervisor was there, he asked but if not, he went ahead, which was something "everybody did" with no resultant threat of disciplinary action. In addition, during the time in question, Yates acted as a fill-in supervisor but never received any instructions with regard to allowing or denying employees the use of the phones, and he never denied any employee such use. Employee Allen Hickle testified that one time he was talking to his son, and his supervisor, Pruitt, walked in, and Hickle simply told him he was checking on his son. Hickle received no disciplinary action. Likewise, employee Ronnie Sartan testified that employees use the phones for personal use and that he had used the warehouse phone, without prior permission and even though the warehouseman saw him, he was not disciplined. Gary Maddox testified that the practice with regard to the phone was "just to use it;" and Randy Lewis, likewise testified that employees used the phones whenever they wanted.

to McCann. Gilbert agreed that he made these remarks to Hartley but credibly testified that he also said what he had to do, "which is call the union."

The direct or implied threat to an employer that an employee who has just been disciplined will refer his problem to a union is a protected activity and cannot be a justifiable basis for discipline unless accompanied by independently abusive words or behavior neither of which is shown to have occurred in these two instances and I reaffirm my conclusion that the Respondent's overall reasons for Gilbert's discharge are pretextual.

Here, the record shows that the Respondent had a generally permissive policy for the local use of company phones and that it seized upon one ambiguous possible breach of a strict interpretation of the rule to immediately discharge a long-term employee who happened to be a known union activist. These facts and the factors discussed above persuasively show that Gilbert was unjustifiably subjected to disparate treatment and I find that the record supports a conclusion that Gilbert's discharge was motivated by a discriminatory intent based on his union activities and his position as a primary union activist, see *Broyhill & Associates*, 296 NLRB 904 (1989).

Under these circumstances, it is clear that the Respondent has failed to shown that Gilbert would have been discharged absent his union activities and protected concerted activity. The General Counsel otherwise has met its overall burden of proof and I further conclude that Respondent's discharge of Gilbert is shown to have been in violation of Section 8(a)(1) and (3) of the Act, as alleged.

CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. By discharging Jack Gilbert on February 9 and 15, 1996, respectively, Respondent engaged in unfair labor practices in violation of Section 8(a)(1) and (3) of the Act.

THE REMEDY

Having found that Respondent has engaged in unfair labor practices, it is recommended that the Respondent be ordered to cease and desist therefrom and to take the affirmative action described below which is designed to effectuate the policies of the Act.

With respect to the necessary affirmative action, it is recommended that Respondent be ordered to reinstate[4] Jack Gilbert to his former job or, if that job no longer exist, to a substantially equivalent position, without prejudice to his seniority or other rights and privileges previously enjoyed, and make him whole for any loss of earnings he may have suffered because of the discrimination practiced against him by payment to him a sum of money equal to that which he normally would have earned from the date of the discrimination to the date of reinstatement, in accordance with the method set forth in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as computed in *New Horizons for the Retarded,* 283 NLRB 1173 (1987),[5] and that Respondent expunge from its files any reference to the discharge, as well as the unlawfully warning, and notify him in writing that this has been done and that evidence of this unlawful discipline will not be used as basis for future personnel action against him.

Otherwise, it is not considered to be necessary that a broad order be issued.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[6]

ORDER

The Respondent, Dravo Lime Company, Maysville Division, Maysville, Kentucky, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging any employee for activity protected by Section 7 of the Act.

(b) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer Jack Gilbert full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

(b) Make Jack Gilbert whole for any loss of earnings and other benefits suffered as a result of the discrimination against him, in the manner set forth in the remedy section of the decision.

(c) Within 14 days from the date of this Order, remove from its files any reference to Jack Gilbert unlawful discharge and within 3 days thereafter notify him in writing that this has been done and that the evidence of unlawful discharge will not be used against them in any way.

(d) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at its facilities in Maysville, Kentucky, copies of the attached notice marked "Appendix."[7] Copies of the notice, on forms provided

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[4] The Respondent contends that Gilbert should be denied reinstatement because he made a threat to the spouse of another employee. Gilbert testified that a month or two before the hearing he received a phone call from the wife of another employee who said:

> Is this the same Jack Gilbert that told my husband he needed a set of balls? I said yes, it is. She said would you like to say that to my face? I said yes, I would. She said if you say that to me I'll slap you. I said if you slap me I'll knock you on your ass and hung up the phone.

In this instance I find that Gilbert did not initiate the confrontation and his alleged threat was impulsive and defensive in nature and is not so egregious as render him unfit for further employment, see *Consumer Power Co.*, 282 NLRB 130, 132 (1986).

[5] Under *New Horizons*, interest is computed at the "short-term Federal rate" for the underpayment of taxes as set out in the 1986 amendment to 26 U.S.C. § 6621. Interest accrued before 1 January 1987 (the effective date of the amendment) shall be computed as in *Florida Steel Corp.*, 231 NLRB 651 (1977).

[6] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[7] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the Na-

by the Regional Director for Region 9, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since June 28, 1995.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps Respondent has taken to comply.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize
To form, join, or assist any union
To bargain collectively through representatives of their own choice
To act together for other mutual aid or protection
To choose not to engage in any of these protected concerted activities.

WE WILL NOT discharge any employee for activity on behalf of United Mine Workers of America, District 17, AFL–CIO, or any other union or for any activity protected by Section 7 of the Act.

WE WILL NOT, in any like or related manner interfere with, restrain, or coerce our employees in the exercise of rights guaranteed them by Section 7 of the Act.

WE WILL, within 14 days from the date of the Board's Order, offer Jack Gilbert full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

WE WILL make Jack Gilbert whole for any loss of earnings and other benefits resulting from his discharge, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to Jack Gilbert's discharge and WE WILL, within 3 days thereafter, notify him in writing that this has been done and that the evidence of unlawful discharge will not be used against him in any way.

DRAVO LIME COMPANY, MAYSVILLE DIVISION

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tional Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."